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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 1047

MILLER AND COMPANY OF BIRMINGHAM, INC., - - - - - - - - - Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MILLER AND COMPANY OF BIRMINGHAM, INC., - - - - - - - - - - *Petitioner,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTORY STATEMENT.

A writ of certiorari should not be granted in this case for five distinct reasons:

(1) The affirmative defense of illegality, upon which the Petitioner's "questions presented" depend, was not raised below.

(2) The Petitioner depends on a strained interpretation of one Alabama statute (Title 48, §205 Code of 1940 Recompiled) for the expression of "public policy" which allegedly voids an otherwise valid contract. The record below does not contain any evidence that the Petitioner was an industry "already established" within the meaning of that Alabama statute.

(3) Another assumption basic to the Petitioner's argument is that the Respondent was acting as a "common carrier" when it executed the contract which the Petitioner seeks to avoid. The record is completely without evidence to support this assumption.

(4) Petitioner asserts that the decision of the Court of Appeals conflicts with the "settled law" of the forum (Alabama); but, on the contrary, it fully comports with the decisions of that state and with the decisions of other forums.

(5) In its brief, Petitioner seeks to apply the reasoning of a line of admiralty cases which is limited to a strict set of facts and which does not apply in cases such as this one.

ARGUMENT.

I.

The Affirmative Defense of Illegality Was Not Raised in the District Court.

It is, of course, axiomatic that this Court will not grant a writ of certiorari to review a question which is not presented by the record in the case. *Tyrrell* v. *District of Columbia*, 243 U. S. 1 (1916). The instant case originated in the Northern District of Alabama as a declaratory judgment suit seeking the interpretation and enforcement of two indemnity provisions contained in a contract between the Petitioner and the Respondent. The case was presented to the District Court on an agreed stipulation of facts. The Petitioner argued in the District Court that the provisions in the

contract should not be construed to require indemnity by Petitioner for loss occasioned by the negligence of the Respondent. The District Court held that the indemnity provisions require the Petitioner to indemnify the Respondent for any loss which it might suffer as a result of the specific personal injury suit referred to in the complaint, namely, a suit filed by one Will Jackson which was pending against the Respondent in the Circuit Court of Jefferson County, Alabama.

The claim that the indemnity provisions of the contract between the Respondent and the Petitioner are illegal as being against public policy is an affirmative defense. Such a defense must be raised by the defendant's answer in the District Court. *Fed. Rules of Civ. Proc. 8(c).* The defense of illegality was not raised in the Petitioner's answer (R. 13-14). In its answer, the Petitioner admitted the existence of the justiciable controversy alleged in the complaint (R. 14), to-wit, "whether the defendant is obligated by virtue of [the indemnity provisions] to defend the suit filed by Will Jackson and indemnify and hold harmless the plaintiff in respect to said suit" (R. 7).

The case then came on for pretrial hearing and the District Court entered a pretrial order in which it listed "all of the issues in controversy" (R. 14). The contentions of the Petitioner were set out in the following paragraph of that order:

> "The defendant concedes that there is a justiciable controversy but denies that the plaintiff is entitled to any relief. It contends specifically that the indemnity agreement does not indemnify the

plaintiff against its own negligent act which it avers is the gravamen of the complaint filed by Jackson against the plaintiff" (R. 15).

The District Court concluded its pretrial order in normal fashion:

> "It is therefore ordered by the court that all of the above-named allowances and agreements be and the same are hereby binding upon all parties in the above styled cause, unless this order be hereafter modified by order of the court" (R. 16).

The order was never modified and no request for such a modification was made. There was no mention of the Petitioner's present contention that the contract was illegal because it contravened public policy.

The District Court found that the Respondent was entitled to indemnity under provisions of the contract and entered its judgment accordingly (R. 24-29). The Petitioner moved for a new trial but did not assign as a ground therefor that the contract was void as against public policy (R. 30). The motion was overruled (R. 31) and an appeal was taken by Petitioner to the Court of Appeals (R. 32-35). In its appellate brief, the Petitioner raised for the first time the question that the indemnity provisions were illegal as being against public policy.

In short, the defense is an afterthought of counsel. It was not raised in the District Court and is, therefore, waived. *Fed. Rules Civ. Proc. 12(h).*

Petitioner now seeks to require the Respondent to defend against this bald assertion of illegality, which

is unsupported by any evidence, without the opportunity of offering evidence in rebuttal. "The burden of showing illegality is upon the party asserting it and it is not sufficient merely to create confusion and suggest doubts as to its legality." *United States* v. *Grace Evangelical Church*, 132 F. 2d 460, 462 (7th Cir. 1943). Please see also *Palmer* v. *Chamberlin*, 191 F. 2d 532, 539 (5th Cir. 1951); *Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 189 F. 2d 913 (2nd Cir. 1951); *Reid* v. *Edwards*, 7 Porter 508 (Ala. 1838). The defense must be pleaded and proved in the District Court. In *Brown* v. *Warner*, 173 F. 2d 162 (5th Cir. 1949), the appellant urged for the first time on appeal that a note sued upon was unenforceable and void because it had been given for stock in a corporation formed for the purpose of manufacturing gambling devices. The court disposed of this "appellate" defense in one sentence:

> "We agree with appellee that the defense of illegality unsupported as it is by either pleadings or proof, was not made out below, and may not be urged here." 173 F. 2d at 164.

A similar result has been reached in numerous other cases. Please see, *e.g.*, *Charm-Tred Mills, Inc.* v. *Erle P. Halliburton, Inc.*, 202 F. 2d 294, 297 (7th Cir. 1953); *C. B. Snyder Realty Co.* v. *Sherrill-Noonan, Inc.*, 261 F. 2d 269, 272 (3rd Cir. 1958); *Beechwood Lumber Co.* v. *Tobin*, 199 F. 2d 878, 881 (5th Cir. 1952); *City of Orange* v. *Fidelity & Deposit Co.*, 180 F. 2d 369, 370

(5th Cir. 1950); *McElhaney* v. *Singleton*, 270 Ala. 162, 169, 117 So. 2d 375, 382 (1960).

We respectfully submit that able counsel for the Petitioner did not raise the defense of illegality by the pleading or evidence below and that, therefore, the "questions" raised in their brief are not truly "presented" for the Court's consideration.

II.

The Evidence Does Not Establish That the Statute Upon Which Petitioner's Argument Depends Is Applicable in This Case.

Petitioner relies on Title 48, Section 205, Alabama Code of 1940 (Recompiled 1959) as the basis for the expression of public policy which the indemnity provisions of the contract allegedly violate. That very brief statute reads as follows:

> "§205. Spur and sidetracks provided for.—Every railroad is required to construct and maintain spur tracks and sidetracks to industries *already established* under such reasonable rules and orders as may be made by the commission" [Alabama Public Service Commission]. (Emphasis added.)

Nowhere in the record is there any evidence that the Petitioner was an industry "already established" within the meaning of the statute. For aught that appears the Petitioner was an industry which was established long after the railroad and was thus in a position to pick its location and to bargain freely with

Respondent and the other railroads in the area with respect to the terms and conditions upon which rail service would be provided.

Without discussing the intent and history of the foregoing statute, it is sufficient to say that no judicial decision has given it the effect sought by the Petitioner, nor has the "Alabama Public Service Commission adopted any general rules to implement the statute, or prohibited the kind of indemnity contract before the Court" (opinion below 328 F. 2d at 78). Thus, the Petitioner seeks to have this Court adopt a strained and totally new construction of a state statute *upon a record which does not contain facts that establish the applicability of the statute.*

III.

There Are No Facts Contained in the Record Which Establish That the Respondent Was Acting as a Common Carrier in the Execution of the Contract Containing the Indemnity Provisions.

Another fallacious assumption upon which the Petitioner is relying is that the Respondent was acting as a common carrier in the execution of the contract containing the indemnity provisions. If the Respondent was not acting as a common carrier, then all of the authorities cited by Petitioner are inapposite.

The Court of Appeals took judicial notice of the fact that the Respondent was a common carrier but concluded that it was "contracting for a service not required of it as a common carrier." 328 F. 2d at 78.

Certainly the Respondent is not acting as a common carrier when it sells, leases and purchases land, nor when it operates a commissary or contracts for the purchase of supplies, etc. There is *no evidence* in the record which establishes that the Respondent was engaged in the activities of a common carrier. In fact, the inference therefrom is that it was not so engaged when it executed the contract in question. Please see *McKinney* v. *Mobile & O. R. Co.*, 215 Ala. 101, 102, 109 So. 752, 753 (1926); *United States* v. *Grace Evangelical Church, supra*, 132 F. 2d 460 at 462. The paucity of the evidence in the record about the circumstances surrounding the execution of the contract containing the indemnity provisions merely shows that the sole issue before the court below was the interpretation of these provisions and not their legality *vel non*.

A writ of certiorari should not be granted to review a case where there is no evi lentiary basis in the record to support the existence of the "questions presented" by the Petitioner.

IV.

The Decision Below Was Correct and Was in Accord With the Law of Alabama and Other Jurisdictions.

Petitioner recklessly asserts that the decision below conflicts with the settled law of Alabama. The four cases cited to support this proposition all involve attempts by a railroad to *extinguish* a liability, not to receive *indemnification* for a liability. There has been no attempt by the Respondent to avoid any liability

which it might owe to Will Jackson, the injured party, who filed a personal-injury suit against the Respondent. The Respondent seeks indemnity from the Petitioner for its potential liability to Jackson, the basis for such indemnity being a contract willingly entered into by Petitioner.

The case of *Gulf, M. & O. R. Co.* v. *Scott*, 32 Ala. App. 326, 27 So. 2d 150 (1946), cited by Petitioner, held that a railroad could not contract to escape *liability* for negligently killing livestock. The basis for this decision is the case of *Central of Ga. Ry. Co.* v. *Hammond*, 210 Ala. 687, 99 So. 74 (1924). That decision points out that Alabama had an "open range" policy and statutory provisions shifting the burden of proof to the railroad to prove that the killing of livestock was not due to its negligence. Thus, the court held that the contract "is void to the extent it attempts to absolve defendant from liability for the consequences of neglect of its statutory duty in the operation of its trains." 210 Ala. at 688, 99 So. at 75. Neither that decision nor the *Scott* case hold that the railroad could not contract for indemnification against such liability; they only hold that a railroad cannot *extinguish* a statutory liability.

The case of *Hissong* v. *Richmond & Danville Rr. Co.*, 91 Ala. 514, 8 So. 776 (1890), involved an employment contract of a railroad employee whereby the railroad sought to escape liability for injuries to the employee. This contract was against the explicit public policy of the State as expressed by the then-applicable

Alabama Employer's Liability Act. Obviously, the case has no bearing on the present situation.

Steele & Burgess v. *Townsend*, 37 Ala. 247 (1861), and *Alabama Great So. RR. Co.* v. *Thomas & Sons*, 83 Ala. 343, 3 So. 802 (1887), also cited by the Petitioner, involved cases wherein, again, a railroad attempted, not to gain indemnity, but to escape liability for negligently handling freight. The *Steele* decision indicates that a carrier may limit its liability for negligence with a shipper by means of a special contract; but regardless of this, it is evident that the two cases cast no light upon the validity of the indemnity contract involved in this case.

The annotation appearing at 175 A.L.R., p. 102, provides numerous examples of decisions wherein indemnity contracts between railroads and industries were upheld. *Eureka Coal Co.* v. *L & N Railroad Co.*, 219 Ala. 286, 122 So. 169 (1929), *Alabama Great So. RR. Co.* v. *Demoville*, 167 Ala. 292, 52 So. 406 (1910) (specifically rejecting public policy defense), *McKinney* v. *M. & O. R. R. Co.*, 215 Ala. 101, 109 So. 752 (1926) (pointing out that railroad is not acting in capacity of common carrier and rejecting public policy defense), and *Southern R. R. Co.* v. *Blunt & Ward*, 165 F. 258 (5th Cir. 1908), all provide examples of the validity under Alabama law of contracts whereby a railroad was indemnified against loss caused by its own negligence. For other examples of the enforcement of similar contracts, please see *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256 (5th Cir. 1961), *Booth-Kelley Lumber Co.* v. *Southern*

Pacific Co., 183 F. 2d 902 (9th Cir. 1950), *Buckeye Cotton Oil Co.* v. *Louisville & N. R. R. Co.*, 24 F. 2d 347 (6th Cir. 1928), *Watkins* v. *Baltimore & O. R. Co.*, 29 F. Supp. 700 (E.D. Pa. 1939); *Deep Vein Coal Co.* v. *Chicago & E. I. Ry. Co.*, 71 F. 2d 963 (7th Cir. 1934), *Gollick* v. *New York Cen. R. R. Co.*, 138 F. Supp. 384 (E.D. Mich. 1956); *Pennsylvania R. R. Co.* v. *Erie Ave. Warehouse*, 193 F. Supp. 471 (E.D. Pa. 1960), *John P. Gorman Coal Co.* v. *Louisville & N. R. R. Co.*, 213 Ky. 551, 281 S. W. 487 (1926) (public policy defense specifically rejected), and *Luton Mining Co.* v. *Louisville & N. R. R. Co.*, 276 Ky. 321, 123 S. W. 2d 1055 (1938) (public policy defense specifically rejected).

In view of the above cited authorities, it is apparent that the decision of the court below merely follows a long line of similar decisions and that there is no conflict of authority presented for this Court to resolve.

V.

The Rationale of the *Bisso* Decision Is Not Applicable to This Case.

In *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955), the owner of a barge sued the owner of a towboat for negligently damaging the barge while it was being towed by the defendant. The towboat owner attempted to *extinguish his liability* (not require indemnification) by pleading the exculpatory provisions of the towage contract. This Court held that the contract was void as against public policy.

Petitioner can gain no comfort from the rule of this decision. Its application has been limited to the unique factual situation which was before the Court and has not been applied even in other closely related admiralty situations. For example, the validity of contracts relieving a maritime pilot from liability for his negligence has been upheld. See *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291 (1932), approved in *Bisso*.

A specific exception to *Bisso* was created in *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminals Corp.*, 360 U. S. 411 (1959). That case involved the same limited factual situation as *Bisso*, but the exculpatory clause contained in the contract was also contained in the towage company's tariff which was on file with the Interstate Commerce Commission. This Court held that the exculpatory clause was not void as a matter of law and that the Court should pass on the legality of the contract only after the I.C.C. had done so.

The rule of *Bisso* has not been applied to carriers by rail, but if it were, it would not be applicable to the present factual situation. It might apply, by analogy, to a situation in which a railroad sought to extinguish any possible liability it might have to a shipper for the transportation of its freight. Even then it would appear that the *Southwestern Sugar & Molasses Co.* exception would apply because of the "pervasive regulatory scheme" (360 U. S. at 418) established by the I.C.C. and the various state Public Service Commissions.

CONCLUSION.

In closing, we think it appropriate to quote from *Richardson* v. *Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. (Full Reprint) 294, 303 (1824), wherein Burrough, Judge, said:

> "'I, for one, protest, as my lord has done against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

The Respondent respectfully submits that the case was tried below on the question of interpretation of the indemnity provisions and not on their validity. The issue of the validity of the provisions is not properly before this Court. The decision of the Court of Appeals is correct in all respects and does not conflict with the law of Alabama or of other jurisdictions. The writ should be denied.

Respectfully submitted.

JAMES A. SIMPSON,
Attorney for Respondent.

CERTIFICATE OF SERVICE.

I, James A. Simpson, attorney for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of May, 1964, a true copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been served upon Mr. James E. Clark, City Federal Building, Birmingham, Alabama, attorney of record for Miller and Company of Birmingham, Inc., by depositing the same in a United States mail box, with first class postage prepaid, addressed to said attorney at said address.

Attorney for Respondent.